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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No.

CHENERY CORPORATION, ET AL., *Petitioners,*

v.

SECURITIES AND EXCHANGE COMMISSION, ET AL.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on April 2, 1951.

OPINIONS BELOW

The opinion and order of the Commission (R. 7-32) and its supplemental opinion and order (R. 34-42) are reported as Holding Company Act Release No. 8318 and No. 8387, respectively. The memorandum opinion of the District Court (R. 52-58) is reported in 87 F. Supp. 289. The opinion of the Court of Appeals (R. 317-326) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 2, 1951 (R. 327). The jurisdiction of this Court is invoked under U. S. Code, Title 28, Section 1254 (1).

QUESTION PRESENTED

Whether the court below has given proper effect to the decisions of this Court in the first and second *Chenery* cases in requiring petitioners, upon the basis of those decisions, to accept a plan of liquidation, despite the fact that the District Court concluded that there is no substantial evidence to support the Commission's findings that the liquidation plan is fair and equitable to petitioners.

STATUTES INVOLVED

Sections 11(e) and 18(f) of the Public Utility Holding Company Act of 1935, 49 Stat. 822, 832, U. S. Code, Title 15, Secs. 79k(e) and 79r(f) provide:

> Sec. 11(e) "In accordance with such rules and regulations or order as the Commission may deem necessary or appropriate in the public interest or for the protection of investors or consumers, any registered holding company or any subsidiary company of a registered holding company may, at any time after January 1, 1936, submit a plan to the Commission for the divestment of control, securities, or other assets, or for other action by such company or any subsidiary company thereof for the purpose of enabling such company or any subsidiary company thereof to comply with the provisions of subsection (b). If, after notice and opportunity for hearing, the Commission shall find such plan, as submitted or as modified, necessary to effectuate the provisions of subsection (b) and fair and equitable to the persons affected by such

plan, the Commission shall make an order approving such plan; and the Commission, at the request of the company, may apply to a court, in accordance with the provisions of subsection (f) of section 79r of this chapter, to enforce and carry out the terms and provisions of such plan. If, upon any such application, the court, after notice and opportunity for hearing, shall approve such plan as fair and equitable and as appropriate to effectuate the provisions of this section, the court as a court of equity may, to such extent as it deems necessary for the purpose of carrying out the terms and provisions of such plan, take exclusive jurisdiction and possession of the company or companies and the assets thereof, wherever located; and the court shall have jurisdiction to appoint a trustee, and the court may constitute and appoint the Commission as sole trustee, to hold or administer, under the direction of the court and in accordance with the plan theretofore approved by the court and the Commission, the assets so possessed.

Sec. 18(f) "Whenever it shall appear to the Commission that any person is engaged or about to engage in any acts or practices which constitute or will constitute a violation of the provisions of this chapter, or of any rule, regulation, or order thereunder, it may in its discretion bring an action in the proper district court of the United States, the district court of the United States for the District of Columbia, or the United States courts of any Territory or other place subject to the jurisdiction of the United States, to enjoin such acts or practices and to enforce compliance with this chapter or any rule, regulation, or order thereunder, and upon a proper showing a permanent or temporary injunction or decree or restraining order shall be granted without bond. The Commission may transmit such evidence as may be available concerning such acts or practices to the

Attorney General, who, in his discretion, may institute the appropriate criminal proceedings under this chapter."

STATEMENT

Much of the history of this controversy is stated in the opinions of the Court in *Securities and Exchange Commission* v. *Chenery Corp.*, 318 U. S. 80 (the first *Chenery* case), and *Securities and Exchange Commission* v. *Chenery Corp.*, 332 U. S. 194 (the second *Chenery* case).

On November 8, 1937, Federal Water Service Corporation registered with the Commission as a holding company and filed with the Commission a plan of voluntary reorganization under the Public Utility Holding Company Act (R. 59). Amended plans were filed thereafter, and discussions were had with the staff of the Commission, and in March 1940 a new plan of reorganization was filed proposing a merger of Federal Water Service Corporation and two of its subsidiaries, Utility Operators Company and Federal Water and Gas Corporation (R. 59-60).

During this period, from November 8, 1937, to June 30, 1940, petitioners purchased preferred stock in Federal Water Service Corporation, in varying amounts as set forth at R. 60. Petitioners were at that time officers and directors of either Federal Water Service Corporation or Utility Operators Company; the Chenery Corporation, also a petitioner, was and is a corporation controlled by petitioner C. T. Chenery (R. 60-61).

The District Court specifically found that these purchases were for valid purposes, and that "there was no double dealing, fraud or lack of disclosure in making the purchases" (R. 61). This finding is not challenged by the court below.

All such purchases stopped abruptly when, on June 29, 1940, the Commission issued tentative findings on the merger plan in which the Commission for the first time, raised a question whether such purchases were proper, and whether the preferred stock thus purchased by petitioners should be allowed to participate equally with other preferred stock in the proposed merger (R. 61). Later, on March 24, 1941, the Commission held that petitioners could not be permitted to participate *pari passu,* because they had breached a fiduciary duty to the other stockholders (R. 61; 117-125). Shortly thereafter the Commission approved, over petitioners' objections, an amended plan which restricted petitioners to cost of stock plus 4 percent interest to the date of the merger, which was required by the plan to be prior to November 1, 1941. (R. 61; 117-125). The merger agreement was then submitted to the stockholders, approved by a requisite majority and became effective on October 30, 1941 (R. 61). Petitioners voted the stock acquired by them against the merger, and announced their intention to seek to have the limitations upon them set aside (R. 62).[1]

The proceeding which petitioners immediately instituted resulted in a decision by this Court that the

[1] Petitioners had, in fact, already filed a petition to review the order of the Commission in the Court of Appeals for the District of Columbia (R. 126). Their letters to the Board of Directors of Federal with their proxies against the merger so stated, and continued that "if, in the proceeding taken * * * to review the order" it should be affirmed, they would surrender their stock, and if it was modified or set aside, they would accept stock *pari passu* instead of demanding its value in cash (R. 62). That proceeding finally resulted in the order being set aside, by the mandate of the Court of Appeals upon the decision and mandate of this Court (318 U. S. 80). However, when Federal took the steps necessary to permit petitioners to accept the stock, the Commission refused to permit the arrangement to be carried out.

Commission's order of September 24, 1941, could not be sustained. *Securities and Exchange Commission* v. *Chenery Corporation,* 318 U. S. 80. The Court found that the general equitable precedents invoked by the Commission in support of its action did not justify it in denying petitioners parity with the other preferred shareholders, and remanded the case to the Commission.

Shortly thereafter, Federal filed with the Commission a request for approval of an amendment to the merger plan to permit petitioners parity treatment (R. 62). Almost two years later, with no further evidence, the Commission refused its approval (R. 63; 131-173). The Commission this time asserted that although petitioners' claims could not be restricted on the grounds of general equitable principles, they could and should be by the special and peculiar circumstances arising from the nature of the Commission's functions under the Act and the voluntary reorganization process established by that Act (R. 150). This Court, upon review, refused to disturb what it called "an allowable judgment" and declined to hold that the Commission was "forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct". *Securities and Exchange Commission* v. *Chenery Corporation,* 332 U. S. 194, 203 (1947).

Meanwhile, on December 31, 1942, Federal had filed with the Commission a plan under Section 11 of the Act looking toward its ultimate dissolution or merger with another company (R. 66). Parts of this plan, and certain supplemental plans, were approved by orders of the Commission beginning in 1943 (*e.g.,* 12 S.E.C. 766). On November 7, 1947, Federal submitted to the Commission an amended and supplemental plan, pur-

suant to Section 11 (e) of the Act, proposing its own liquidation and dissolution and providing for the satisfaction of all claims against it and distribution of its remaining assets to its stockholders. The plan provided for alternate methods for distributing its assets among its shareholders dependent upon the Commission's determination as to what limitations should be put upon the claims of petitioners (R. 66, 9).

The Commission set down Federal's plan for hearing and specified as one of the issues: the amount of Federal's assets that should be set aside in satisfaction of the claims of the petitioners in order to effectuate the purposes of Section 11(b) of the Act and to make the plan fair and equitable to the persons affected by it (R. 5-6). The petitioners sought leave to intervene to oppose an inequitable limitation of their claims, and were heard (R. 70). After hearing, the Commission approved Federal's plan of dissolution on condition that it be amended to provide that $313,190 be set aside in full and complete satisfaction of petitioners' claims (R. 7-32). The Commission held, first, that the Merger Plan, which both it and this Court had previously considered, constituted a final determination that payment of $313,190 in full satisfaction of petitioners' claims would be fair and equitable (R. 18). The Commission went on, however, to consider independently what amount the petitioners might be allowed in the dissolution of Federal, and decided that it would not be fair and equitable to allow them anything in excess of $313,190, the cost of their preferred stock plus interest at 4 percent to October 31, 1941, the effective date of the merger (R. 20-22). A plan amended to conform to the Commission's opinion was approved on July 27, 1948 (R. 34).

The Commission applied to the District Court of Delaware, pursuant to Section 11(e) and 18(f) of the Act, to enforce the plan of Federal as amended in accordance with its order (R. 3). In its application for enforcement the Commission requested, *inter alia*, that the District Court issue an appropriate order enforcing the provisions of the plan as approved by the Commission and enjoining all claimants against Federal, including the petitioners, from taking any action that might tend to interfere with the carrying out of the provisions of the plan (R. 4.). Except for Section 3 of the plan, which provided that payment to petitioners of $313,190, representing the cost of their stock plus interest to October 1, 1941, would be in full satisfaction of petitioners' claims, the plan was promptly, and without opposition, ordered enforced (R. 1).

The District Court was clear as to the merits of Section 3 of the plan, relating to petitioners' claims. It rejected the Commission's independent determination as to its fairness and equity, and stated that it would have

> "no hesitation in holding there is no substantial evidence to support the Commission's finding that Chenery should be penalized and limited to cost plus interest for its preferred stock purchases" (R. 57)

The District Court also stated that

> "Chenery successfully shows that the policy of the Commission—to prohibit and penalize purchases of stock by officers and directors during reorganization—was only an avowed policy in that it was never followed by the Commission, except in the instant case; and if such policy ever existed it was clearly abandoned by the Commission six

> months prior to the time it entered the order now on review in the instant case." (R. 56)

Nevertheless, the Court stated that it was compelled to approve and enforce Section 3, as requested by the Commission, because of the decision of this Court in the second *Chenery* case, 332 U. S. 194.

Petitioners appealed to the Court of Appeals for the Third Circuit (R. 69), but prior to the consideration of the appeal by that court sought, without success, a writ of certiorari from this Court, 340 U. S. 831. Thereafter, on April 2, 1951, the court below affirmed the judgment of the District Court (R. 327). The opinion below states that the rights of petitioners have been "conclusively determined in the prior reorganization and merger proceedings" (R. 322). The court did not indicate any disagreement with the conclusion of the District Court that the "rule" penalizing stock purchases by management pending reorganization had been abandoned immediately after penalizing petitioners herein, but stated that the argument of petitioners that they should not be the victims of a "rule" applied only in their case, "while it has its appeal, is not available to defeat the operation of the rule of res judicata" (R. 325).

SPECIFICATION OF ERRORS TO BE URGED

1. In holding that petitioners' rights were conclusively determined by the proceedings in the second *Chenery* case.

2. In holding that the prior proceedings had conclusively determined as a fact that petitioners' only rights were those of creditors.

3. In applying the strict doctrine of res judicata to the reorganization and merger proceedings of the Securities and Exchange Commission.

4. In affirming the order of the District Court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW WARRANTS REVIEW BY THIS COURT TO DETERMINE WHETHER IT ACCORDS PROPER APPLICATION AND SCOPE TO EARLIER DECISIONS OF THIS COURT IN THE PROCEEDINGS.

The court below accords to the decision of this Court in the second *Chenery* case an effect far beyond that which we believe to be warranted, and wholly ignores the probable controlling authority of the first *Chenery* case. Review by this Court is necessary to determine whether its earlier decisions are being given proper scope and application.

The essential facts in this case are, in reality, only two in number. The first fact is that without any fault whatever on petitioners' part, they are being drastically penalized by having all but a small share of the assets allocable to them on the liquidation of Federal turned over, as a windfall, to the other shareholders. The District Court made an explicit finding of absence of fault of any kind (R. 61), and in his memorandum opinion the District Judge said (R. 57) that if he were not, as he thought he was, foreclosed, he—

> "would have no hesitation in holding there is no substantial evidence to support the Commission's finding that Chenery should be penalized".

The District Court's finding was not disturbed by the court below.

The second fact in this case is that petitioners alone have been so penalized. The "rule" which the Commission found in the Holding Company Act, and which was "formulated" as a "standard" and applied, *ex post facto,* in the second *Chenery* case, was immediately abandoned; management stock purchases during reorganization proceedings since the *Chenery* case have not been proscribed or punished (R. 56). Again, the District Judge forcefully states the point (R. 56):

> "Chenery successfully shows that the policy of the Commission—to prohibit and penalize purchases of stock by officers and directors during reorganizations—was only an avowed policy in that it was never followed by the Commission, except in the instant case; * * *"

Again, the court below appears to concur (R. 325).

Stated baldly, in other words, petitioners, without fault on their part, are being singled out for drastic penalties under a "rule" or "standard" which makes absence of fault in the particular case irrelevant, but which did not exist, except to punish them alone. The court below has approved an injunction compelling petitioners to accept that result, solely because of the alleged binding effect of this Court's decision in the second *Chenery* case. We believe it does not compel, and indeed does not support, such an obvious and gross injustice.

1. The Court, in the second *Chenery* case, was led to its conclusion by the representations of the Commission, in its opinion and in its briefs, that the Commission was stating a new rule or standard of conduct derived from the Holding Company Act, making absence of fault in the particular case irrelevant. In the first

Chenery case, in which the Court found the order penalizing petitioners unsupportable in the absence of such a rule, the opinion pointed out the possibility which the Commission later purported to adopt (318 U. S. at p. 92):

> "Had the Commission, acting upon its experience and peculiar competence, promulgated a general rule of which its order here was a particular application, the problem for our consideration would be very different."

The Commission's 1945 opinion thereupon discovered a rule which would make absence of fault in the particular case irrelevant (see R. 153, 160, 163, 165).[2] There is no doubt that this Court, in the second *Chenery* case, so understood the Commission's decision. The Court said (332 U. S. at p. 203):

> "Hence we refuse to say that the Commission, which had not previously been confronted with the problem of management trading during reorganization, was forbidden from utilizing this particular proceeding for announcing and applying a new standard of conduct."

2. However, by the time Federal's plan of dissolution came before the Commission, this "new standard of conduct" had ceased to exist. So far as the records show, it was never applied except against petitioners. In three cases indistinguishable in any material way from the circumstances in which the Commission discovered and applied the "rule" against petitioners, the

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[2] The District Court stated (R. 56): "The Commission's opinion in the Chenery case seems clearly to indicate that the circumstances of such case are not controlling but that all transactions in securities during reorganiations by officers and directors, are prohibited."

Commission permitted reorganization managers, who purchased stock during the pending of a plan, to participate in that plan on a parity with other holders of the same class of stock. *In the Matter of Cities Service Co.,* October 1, 1947, Holding Company Act Release No. 7720 (R. 202-228); *In the matter of American States Utilities Co.,* October 3, 1947, Holding Company Act Release No. 7721 (R. 228-253); *In the Matter of Middle West Corporation,* December 9, 1947, Holding Company Act Release No. 7905 (R. 254-312), *sub nom. In re North West Utilities Co.,* 76 F. Supp. 63 (D. C. Del. 1948).

In these three cases, the Commission attempted to excuse its failure to apply the "new standard of conduct" by considering actual harm or degrees of potential harm—considerations totally irrelevant to the standard applied to Chenery. In the light of that rationalization by the Commission, the District Court stated (R. 57):

> "If the facts and consequences of a particular case determine whether a penalty should be inflicted, I think it is clear that the plan could not be approved as fair and equitable. This case is by far the strongest on the facts against the imposition of the penalty."[3]

3. In the first *Chenery* case, the Court held that, absent a "general rule", petitioners could not be penalized. Essentially, therefore, the Commission now seeks to achieve the result which this Court refused to sanc-

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[3] The Court should note that even reorganization managers who made stock purchases knowing of the Commission's disapproval thereof in *Chenery,* were permitted parity treatment. In the *Matter of Cities Service Co., supra.* For petitioners, who *are* penalized, the "new standard of conduct" was admittedly wholly *ex post facto.*

tion in the first *Chenery* case. We believe this Court, in the second *Chenery* case, did not intend to sanction mere formalism; when it approved a decision against petitioners by reason of a "new standard of conduct", it did not mean a new standard applicable *only* to petitioners.

We believe that it is necessary and appropriate, therefore, that this Court grant a writ of certiorari to determine whether proper scope and effect is being accorded to its decisions in both the first and second *Chenery* cases, under the facts as they are now shown to exist.[4]

II.

The Decision Below Raises Important Questions as to the Scope of the Doctrine of Res Judicata in Proceedings to Which Administrative Agencies Are a Party.

The opinion of the court below lays principal emphasis on the doctrine of *res judicata*. In applying the doctrine under the circumstances of this case, the court

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[4] The Commission has sought to make much of the fact that a few days before petitions for rehearing were denied in the second *Chenery* case, Federal filed a supplement to its petition for rehearing containing the decisions of the Commission in *Cities Service* and *American States* cases, *supra*, which had been decided a few days earlier. Patently, the very limited review accorded to a supplement to a petition for rehearing cannot be compared with the review which can be given on this record, with both findings of fact and an opinion in the District Court, and an opinion of the Court of Appeals. Moreover, the limited time allowed did not permit the full exposition of the Commission's new position; indeed, the third case, the *Middle West* case, *supra*, which served to round out the new doctrine by which the "new standard of conduct" was abandoned, was not decided until about two months after the petition for rehearing had been denied.

has decided important questions as to the proper scope and application of that doctrine which appear to be in conflict with applicable decisions of this Court and of the other Courts of Appeals, or, alternatively, which have not been, but should be, decided by this Court.

A. THE HOLDING OF THE COURT BELOW THAT THE DECISION IN A MERGER PROCEEDING IS RES JUDICATA AS TO THE ISSUES IN A DISSOLUTION PROCEEDING IS IN PROBABLE CONFLICT WITH THE DECISION OF THE COURT OF APPEALS FOR THE SECOND CIRCUIT IN THE EVERGREENS V. NUNAN, 141 F. (2d) 927.

Prior decisions of this Court in the first and second *Chenery* cases dealt with the rights of petitioners under a merger plan—whether the plan was fair and equitable to all persons affected by it and appropriate to effectuate the purposes of the Holding Company Act. Petitioners, had they been allowed parity treatment, would have held 10.1 percent of the voting power (R. 142) which is made presumptive "control" by the Act; control of the future operations and conduct of the reorganized companies was therefore a dominant factor.

The dissolution of Federal is a wholly new matter. It presents no question as to "control" of utility operations. The narrow—and different—question in the present proceeding is simply: who is entitled to Federal's assets after its debts have been satisfied. The previous issue before the Commission centered about the terms and conditions upon which it would be fair, under the Holding Company Act, *to operate* new properties. The present issue goes to the terms and conditions under which it will be fair and equitable *to distribute its assets in liquidation, to cease all operations.* The fundamental requisite of *res judicata*—identity of issues—is lacking.

The court below, however, has nevertheless made the merger proceeding controlling by asserting that "facts"

found in the merger case are now beyond judicial re-examination. The court below stated (R. 324):

> "It is the fact that they are entitled only to claim as creditors and not as stockholders which is res judicata."

Patently, the actions which petitioners maintained in the first and second *Chenery* cases did not seek adjudication of the issue whether they were stockholders or creditors. The issue, simply, was whether petitioners should receive the same as, or less than, other shareholders of the same class in the exchange contemplated by the merger. No order of the Commission has ever required them to turn in their stock, and they still hold it. The extent of their participation in the assets upon the dissolution of Federal was not an issue which was or could have been dealt with in the merger proceedings—an essential prerequisite to the application of the doctrine of res judicata. *Angel* v. *Bullington*, 330 U. S. 183, 192-193.

If it is possible to say—and we doubt it—that the decision in the second *Chenery* case "determined" that petitioners were creditors, it can be only on the ground that such a conclusion must logically follow from the actual decision—that petitioners should not share *pari passu* in the merger. But the decision of the court below giving to such a "fact", thus derived only from alleged logical relevance, the status of a matter which is res judicata, is then in conflict with the decision of the Court of Appeals for the Second Circuit in *The Evergreens* v. *Nunan*, 141 F. (2d) 927 (1944). In that case, the issue was likewise as to the conclusive character, by operation of res judicata, of a certain fact logically derived from the decision in an earlier case. In the earlier case, in determining the value of fully im-

proved cemetary lots, the Tax Court had also "determined" the cost of improving the lots. In the later case, the taxpayer urged that the earlier determination as to the cost of improving the lots was res judicata. The Court rejected the contention. It stated (141 F. (2d) at p. 929):

> "It is altogether right that the judgment shall forever put an end to the first cause of action; but it is not plain that it is always fair that every fact—'ultimate' or 'mediate datum'—decided in it, shall be conclusively established between the parties in all future suits, just because the decision was necessary to the result. * * * There is no reason for subjecting the loser to such extravagant hazards; unless the decisions compel us to go so far, we will not do so."

The Court should grant a writ of certiorari to resolve this conflict in the decisions of the Courts of Appeal, and to make plain the extent to which res judicata is applicable in such circumstances.

B. THE DECISION BELOW RAISES IMPORTANT QUESTIONS AS TO THE PROPER APPLICATION OF THE PRINCIPLES OF RES JUDICATA TO ADMINISTRATIVE PROCEEDINGS, PARTICULARLY IN THE LIGHT OF THE ADMINISTRATIVE PROCEDURE ACT WHICH HAVE NOT BEEN, BUT SHOULD BE, DECIDED BY THE COURT.

As we have shown in the preceding section, the issues before the Commission in respect to Federal's dissolution plan were not identical with those litigated in the previous merger proceeding and there is, therefore, no proper factual basis for the application of res judicata. Even if the issues were the same, however, we believe that the decision of the court below refusing to reexamine the issues raises an important question as to the proper application of res judicata in administrative proceedings, particularly in the light of the Administrative Procedure Act.

The decision below, which applies the strict rule of res judicata to a rule-making function, appears to conflict with the many decisions which have considerably limited the doctrine of res judicata in administrative proceedings. *E. g. Securities and Exchange Commission* v. *Otis & Co.,* 338 U. S. 843 (subordinated to requirement of exhaustion of administrative remedies); *Wilbur* v. *United States,* 281 U. S. 206 (Secretary of Interior's decision on Indian claim on land patents not binding on his successor because made in exercise of administrative authority); *West* v. *Standard Oil Co.,* 278 U. S. 200 (Secretary of Interior permitted to revoke previous decision and redetermine whether certain land was known to have mineral deposits); *United States* v. *Stone & Downer Co.,* 274 U. S. 225 (res judicata not applicable to determinations under custom laws); *Pearson* v. *Williams,* 202 U. S. 281 (immigration authorities allowed to rectify earlier error); *Lum Mon Sing* v. *United States,* 124 F. 2d 21 (9th Cir. 1941) (same); *Grandview Dairy* v. *Jones,* 157 F. (2d) 5 (2d Cir. 1946) (eligibility for allowance under milk marketing agreement may be redetermined by Milk Administrator); *Sprague* v. *Woll,* 122 F. (2d) 128 (7th Cir. 1941) (ICC not bound by prior final decision that railroad was entitled to exemption from regulation); *Greater Kampeska Radio Corp.* v. *Federal Communications Commission,* 108 F. (2d) 5 (App. D. C. 1939) (initial finding that broadcast permit holder was qualified may be reversed); *Froeber-Norfleet* v. *Southern Railway Company,* 9 F. Supp. 409 (D. C. Ga. 1934) (ICC determination that certain rates are reasonable does not permit reconsideration and finding of unreasonableness when intervening Commission order in a separate docket is inconsistent); *Di Donato* v. *Rosenberg,* 256 N. Y. 412, 176 N. E. 822

(1931) (State Industrial Board permitted to vacate previous award notwithstanding court approval of that award).

Courts have recognized, in other words, as have commentators, that much of the basis for the inexorable application of res judicata disappears when a regulatory agency is party to the litigation.[5] Agencies have a continuing jurisdiction to legislate, regulate and enforce broadly with respect to various areas of business, are more readily accessible than courts, and often by statute assume the burden of litigation that would otherwise be private. All of these factors, and a growing recognition that it is more important that errors be rectified and justice be achieved rather than sacrificed to the objective of terminating litigation, have served to qualify and delimit the application of res judicata.[6]

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[5] See Griswold, *Res Judicata in Federal Tax Cases*, 46 Yale L.J. 1320 (1937); Davis, *Res Judicata in Administrative Law*, 25 Texas L. Rev. 199 (1947); Schopflocher, *The Doctrine of Res Judicata in Administrative Law*, 1942 Wis. L. Rev. 5, 198; *Res Judicata and Intra-Governmental Inconsistencies*, 49 Col. L. Rev. 640 (1949). In a petition for certiorari in *Securities and Exchange Commission* v. *Otis & Co.*, 338 U. S. 843 (No. 244, Oct. 1949), the Commission itself has admitted (pp. 14-15):

> "The Commission did not argue, as the court below apparently suggests (R. 79-80) that the doctrine of *res judicata* is not applicable to administrative agencies, though when and under what circumstances it is applicable are exceedingly complex questions toward the solution of which the courts are still finding their way. See Davis, *Res Judicata in Administrative Law*, 25 Tex. L. Rev. 199; *Res Judicata and Intra-Governmental Inconsistencies*, 49 Col. L. Rev. 640."

[6] The language of the Court of Appeals for the District of Columbia expresses the weight to be given the element of continuing jurisdiction of administrative agencies:

> "It is for this reason we hold against the contention of petitioner's and not because of lack of any of the elements

Indeed, in its own decision in this proceeding, the Commission expressly declined to hold that it was bound by res judicata (R. 19).

Moreover, the decision below raises important questions which have not been, but should be, settled by this Court as to the application of the Administrative Procedure Act.

Presumably there is no dispute that the doctrine of res judicata is inapplicable to quasi-legislative proceedings. *Prentis* v. *Atlantic Coast Line,* 211 U. S. 210; *Sprague* v. *Woll,* 122 F. (2d) 128 (7th Cir. 1941). The court below, however, held that in the proceedings in the merger case, the Commission was acting in a quasi-judicial capacity (R. 323). That decision not only appears to be in error, but it raises important questions under the Administrative Procedure Act.

Section 2 of that Act distinguishes between the *adjudicatory* function, in performing which the agency acts as a court subject to the traditional rules of court process, and the *rule-making* function, in which the agency legislatives within the limits of its delegated authority. Section 2(c) defines "rules and rule making" as follows:

> " 'Rule' means the whole or any part of any agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe

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which usually make out a case for the application of res judicata. The doctrine is not to be used where the circumstances create a semblance of conditions for its application but to apply it would submerge the plan of Congress for the administration and enforcement of its policy." *Denver Building & Construction Trades Council* v. *NLRB,* 186 F. (2d) 326, 332 (1950).

> the organization, procedure, or practice requirements of any agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing upon any of the foregoing. 'Rule making' means agency process for the formulation, amendment, or repeal of a rule." 5 USCA Sec. 1001(c), 60 Stat. 237 (1946).

In the same category, therefore, with the prescription of rates, which was a function squarely held *not* to give rise to res judicata in the *Prentis* case, is "prescription for the future of * * * corporate or financial structures or reorganizations thereof" whether "of general or particular applicability". This, indeed, was the recommendation of the Securities and Exchange Commission to Congress.[7]

We do not suggest, of course, that matters be relitigated forever when a merger or reorganization is involved, or an agency is a party. We *do* suggest that there has been a recognition that the law or facts often change so as to make it fair to redetermine an issue after it has once been decided. Whether, in this case, the court below was correct in flatly refusing, because of res judicata, to take those factors into account (see R. 325), we submit is an important question warranting review by this Court.

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[7] See Foster, *Application of the Administrative Procedure Act to the Statutes Administered by the Securities and Exchange Commission* in Federal Administration Procedure Act and the Administrative Agencies (NYU School of Law Institute—Proceedings, Vol. VII) pp. 245-246 (1947).

C. THE DECISION BELOW IS IN PROBABLE CONFLICT WITH THE DECISION OF THIS COURT IN COMMISSIONER V. SUNNEN, 333 U. S. 591.

In *Commissioner* v. *Sunnen,* 333 U. S. 591, a taxpayer had assigned his interest in certain royalty agreements to his wife and thereafter all payments due under such agreements were made to her. The Board of Tax Appeals had earlier held that the taxpayer was not taxable on the amounts paid to his wife during the years 1929-1931. Subsequently, the taxpayer's liability for the years 1937-1941 came before the Tax Court. During those years income from royalty agreements made by the taxpayer had been paid to his wife (a) under the very same agreements and assignments that were the subject of the Board of Tax Appeals ruling for the years 1929-1931, and (b) under additional agreements and assignments entered into subsequent to 1931, but identical with the earlier ones in all significant respects. The Tax Court held that res judicata prevented inclusion in the taxpayer's income for 1937-1941 payments to his wife made under the same agreements ruled upon in the earlier determination. It determined, however, that there should be included in his income payments made to his wife under the subsequent agreements. The basis for this change in ruling was a line of cases that had been decided by the Supreme Court subsequent to the Board of Tax Appeals' earlier decision which sharply limited a taxpayer's opportunity to avoid tax by assigning or transferring income to others, especially members of his family, *e.g. Helvering* v. *Clifford,* 309 U. S. 331 (1940); *Helvering* v. *Horst,* 311 U. S. 112 (1940).

This Court, upon review of the Tax Court's action, held that all of the 1937-1941 royalty payments could properly be taxable to the taxpayer. The Court's analysis of the fundamental policy behind res judicata

and its corollary doctrine, collateral estoppel or estoppel by judgment, and its explanation of why that policy must be subordinated to more important objectives, appears to be wholly at odds with the decision below.

As to the tax liability under the later agreements, the Court held that the issue of tax liability in the latter years was sufficiently different from the question of tax liability in the earlier years as not to bar redetermination of the issues once decided. It said (333 U. S. at p. 601):

> *"But if the relevant facts in the two cases are separable, even though they be similar or identical, collateral estoppel does not govern the legal issues which recur in the second case.* Thus the second proceeding may involve an instrument or transaction identical with, but in a form separable from, the one dealt with in the first proceeding. In that situation, *a court is free in the second proceeding to make an independent examination of the legal matters at issue. It may then reach a different result or, if consistency in decision is considered just and desirable, reliance may be placed upon the ordinary rule of stare decisis."* (Emphasis added.)

Certainly, in this case, a proceeding to determine the terms upon which a corporation shall continue to operate is different and separable from one to determine the terms upon which it will be permitted to distribute its assets and dissolve.

The Court went further, however, and held that tax liability under the very contract which the Tax Court had already passed upon could be re-examined because of the intervening legal developments. In this respect the Court said (333 U. S. at p. 603):

> "A more difficult problem is posed as to the $4,881.35 in royalties paid to the taxpayer's wife

> in 1937 under the 1928 contract. Here there is complete identity of facts, issues and parties as between the earlier Board proceeding and the instant one. The Commissioner claims, however, that legal principles developed in various intervening decisions of this Court have made plain the error of the Board's conclusion in the earlier proceeding * * *. It must therefore be determined whether this *Clifford-Horst* line of cases represents *an intervening legal development which is pertinent to the problem* raised by the assignment of the 1928 agreement and which makes manifest the error of the result reached in 1935 by the Board. *If that is the situation, the doctrine of collateral estoppel becomes inapplicable."* (Emphasis added.)

Enough has already been stated to indicate the applicability of the *Sunnen* case here. The Commission, no less than the Commissioner of Internal Revenue, is charged with continuing enforcement of an important policy of Congress. That enforcement involves a nice balancing of public and private interests. It is equally contrary to the interests of good administration, in each case, to perpetuate discriminations and inequities by a blind application of res judicata or collateral estoppel.

In the present case, the basis for re-examination is overwhelming. The unique circumstances which point so strongly to the existence of one rule for petitioners, and a totally different rule for everybody else do not merely warrant redetermination; they demand such redetermination in the interests of fair play and equality under the law.

CONCLUSION

Wherefore, for the several reasons stated above, the petition for certiorari should be granted.

Respectfully submitted,

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